1928

Presumptions Affecting the Recovery of Preferences by Trustee in Bankruptcy

Fowler V. Harper
Indiana University School of Law

PRESUMPTIONS AFFECTING THE RECOVERY OF PREFERENCES BY TRUSTEE IN BANKRUPTCY

FOWLER VINCENT HARPER*

The many vexatious questions arising in a trustee's suit to recover property of the bankrupt which has been conveyed contrary to the provisions of the Bankruptcy Act will fall under one or more of three sections of the statute. The transaction may be avoided under section 67e if it be one made with the intent to hinder, delay and defraud creditors. This involves the rules of the common law of fraud which have developed under statute 13 Elizabeth, c. 5.[1] Again the question of fraud may be raised by the trustee basing a recovery under section 70e, under which the statutory modifications of the particular state may be invoked.[2] The state law of fraud may likewise be raised under the second paragraph of section 67e, but because of the time limitation, section 70e is usually relied upon instead.[3] But even if there be no fraud, actual or constructive, according to the immemorial law or by modern statutory provisions, the trustee may, in some instances, recover property the transfer of which has resulted in giving to one creditor a preference over others of the same class. Sections 60a and 60b provide for this situation.

It will be seen that actions based upon fraud are not peculiar to bankruptcy law for the statute merely allows the trustee to avoid transfers void or voidable at the common law or under the state law. The clause pertaining to preferences, however, raises questions characteristic of bankruptcy law and the solution of these problems constitutes a considerable bulk of bankruptcy litigation.

The general requirements for the trustee to fulfill before he can avoid a preference are easily enough stated and comprehended. The manner in which he can satisfy these requirements, however, is not so simple. A great deal of the difficulty lies in the nature and extent of proof required to show the elements of a preference. It is with the presumptions affecting

---

*[Professor of Law, School of Law, University of North Dakota.]

[1]See GILBERT, COLLIER ON BANKRUPTCY (1927) 1018; *cf. ibid.* 85.

[2]See Dodd v. Raines, 1 Fed. (2d) 658 (D. C. Ga. 1924); See BLACK, BANKRUPTCY (4th ed.) 1199; *cf.* COLLIER, BANKRUPTCY (9th ed.) 952.

[3]See COLLIER, *op. cit. supra* note 2, at 957.

this proof and the extent of their effect that this study is concerned.

Section 60b provides as follows:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment . . . and being within four months of the filing of the petition in bankruptcy or after the filing thereof and before adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. . . "

It is thus seen that a voidable preference must consist of several elements among which are the following: (1) the bankrupt's estate must have been depleted; (2) the transfer must enable the transferee to obtain a greater percentage of his claim than other creditors of the same class; (3) the transfer must have been made within four months; (4) the transfer must have been made while the debtor was insolvent; (5) the person receiving the property or assets or the person to be benefited thereby must have had reasonable cause to believe that a preference would be effected.[4]

It is obvious that there will have been no preference unless the payment was out of the bankrupt's estate. The depletion of the estate is the test to be employed.[5] The burden of proof is here upon the trustee, and he must sustain the burden of proving that money or property which rightfully belongs to all the creditors was transferred to the preferred creditor,[6] or for his benefit, for mere circuity of arrangement as to the transfer will not relieve it of its preferential character.[7] Likewise, the burden of proof is upon the trustee to show that the creditor

[4]Re Shaw, 7 Fed. (2d) 381 (D. C. N. J. 1925); Wolf Mfg. Co. v. Battreal Shoe Co., 192 Mo. App. 113, 180 S. W. 396 (1915); Kimmerle v. Farr, 189 Fed. 295 (C. C. A. 6th, 1911). See also GILBERT, *op. cit. supra* note 1, at 815.

[5]Lowell v. Brown, 280 Fed. 193 (D. C. Mass. 1922).

[6]Miller v. Fisk Tire Co., 11 Fed. (2d) 301 (D. C. Minn. 1926).

[7]Newport Bank v. Herkimer Bank, 225 U. S. 178, 32 Sup. Ct. 633 (1912); Miller v. Fisk Tire Co., *supra* note 6.

receives, by reason of the transfer or payment, a greater percentage of his claim than other creditors of the same class.[8]

Not all preferences are voidable for there is nothing inherently wrong about a preference. The law invalidating them is dependent upon the extent to which public policy demands an equitable distribution of a debtor's assets among all his creditors. Hence preferences must be distinguished from fraud.[9] The latter may always be avoided by the trustee, the former only when prohibited by the Bankruptcy Act. In other words, the two sections, *supra,* pertaining to fraud, prohibit all fraudulent transfers, while the section allowing the trustee to recover preferential payments or transfers specifically designates certain ones only as voidable.

Consequently the trustee cannot attack transfers as preferences within the prohibition of section 60b unless they occurred within the four months limitation,[10] and the burden of proof is upon the trustee to establish such fact.[11] He may be able to recover the property under some section of the Act, namely 70e, as a fraudulent conveyance, if the transfer occurred prior to the four months period, but not because it amounts to a preference. Since the presumption favors the validity of the payment of a valid debt, even if the trustee shows all the other elements of a voidable preference, he must still show, by a preponderance of the evidence, that it took place not before the next preceding four months from the filing of the petition in bankruptcy.

---

[8]Re Shaw, *supra* note 4.

[9]For discussion of distinctions between fraudulent and preferential transfers, see Van Iderstine v. Nat. Discount Co., 174 Fed. 518 (C. C. A. 2d 1909), *aff'd,* 227 U. S. 575, 33 Sup. Ct. 343 (1913); Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436 (1909).

[10]In re East End Mantel & Tile Co., 202 Fed. 275 (W. D. Pa. 1913); Jackson v. Sedgwick, 189 Fed. 508 (C. C. N. Y. 1911). The case of transfers such as mortgages, which were made prior to the four months period, but which were registered or recorded within that period, should be noted. Since the 1910 amendment to section 60b, the validity of the mortgage is to be judged as of the time of the recording, rather than of the time of execution, where such recording is required. Davis v. Savings Society, 210 Fed. 768 (C. C. A. 4th, 1913); WILLISTON, CASES ON BANKRUPTCY (2d ed. 1913) 277; In re Bunch Commission Co., 225 Fed. 243 (D. C. Ark. 1915). Since the 1926 amendment to section 60a, adding the words "or permitted" after the word "required", the four months period runs from the time of the recording in an increased number of cases. See R. F. Colin, *An Analysis of the 1926 Amendments to the Bankruptcy Act* (1926) 26 Col. L. REV. 789, 801. See also GILBERT, *op. cit. supra* note 1, at 824, 825.

[11]The four months limitation is one of the "elements" of a voidable preference which the trustee is bound to show. See GILBERT, *op. cit. supra* note 1, at 817.

The bankrupt must be insolvent at the time of the transfer complained of. Even though he was insolvent shortly after, there can be no preference if, at the time, he was, in fact, solvent. The fact that the bankrupt might have become insolvent within four months of the filing of the petition is of no significance providing it was subsequent to the transfer, for insolvency must be determined solely as of the time of such transfer.[12] This is consistent with the definition of a preference that it be a transfer or conveyance which will "enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."[13]

Insolvency, as contemplated by the bankruptcy law, means that the aggregate of the bankrupt's property and assets is not sufficient, at a fair evaluation, to meet liabilities.[14] The mere fact that he is unable to meet his bills as they fall due,[15] or that he is embarrassed,[16] is not sufficient for the Act contemplates insolvency in but one sense, namely, liabilities in excess of assets.[17] It has been held that, although the definition of insolvency found in the Bankruptcy Act must control in the federal courts, the state rule will be followed where the proceeding is one in a state court to determine whether a transfer of a debtor is a preferential one or not.[18] This, however, is not the

---

[12]Hicks Co. Ltd. v. Moore, 261 Fed. 773 (C. C. A. 5th, 1919); Matter of Looschen Piano Case Co., 259 Fed. 931 (D. C. N. J. 1919); Re Keller, 252 Fed. 942 (E. D. Mich. 1918); Re Leach, 171 Fed. 622 (C. C. A. 6th, 1909).

[13]See Bankruptcy Act, § 60a.

[14]See Bankruptcy Act, § 1 (15). A "fair evaluation" includes a business as a "going concern", and not as mere dead property after bankruptcy has intervened. In re Klein, 197 Fed. 241 (C. C. A. 6th, 1912). But the assets do not include property transfered in fraud of creditors. Utah Association of Credit Men v. Boyle Furniture Co., 39 Utah, 518, 117 Pac. 800 (1911).

[15]Newman v. Tootle-Campbell Dry Goods Co., 174 Mo. App. 528, 160 S. W. 825 (1913). Consistent with this, knowledge by a creditor that the bankrupt failed to meet his obligations promptly is not sufficient notice as a mater of law to pnt him on inquiry. Ark. Nat. Bank v. Sparks, 83 Ark. 324, 103 S. W. 626 (1907).

[16]In re Chappell, 113 Fed. 545 (D. C. Va. 1901). Consistent with this, knowlcdge by a creditor that the hankrupt was financially emharrassed is not sufficient notice. Re Wolf Co., 164 Fed. 448 (D. C. Pa. 1908). The fact that a corporation engaged in the performance of a contract which required a considerahle expenditure before it was entitled to payment thereunder arranged with a bank for making overdrafts is no evidence that it was insolvent at the time within the meaning of the Bankruptcy Act. McDonald v. Clearwater Shortline R. Co., 164 Fed. 1007 (C. C. Idaho, 1908).

[17]Ogden v. Redish, 200 Fed. 977 (D. C. Ky. 1912).

[18]Simpson v. Western Hardware & Metal Co., 97 Wash. 626, 167 Pac. 113 (1917).

law in California[19] and is clearly opposed to the weight of authority.[20]

The burden of proof to show insolvency at the time of the alleged preferential transfer is upon the trustee.[21] He must make it appear affirmatively that insolvency existed at that time. In the case of a transfer, required or permitted by law to be registered or recorded,[22] the transferor must have been insolvent at the date on which it was filed for record.[23] It has been recently held that where it appears that the debtor's assets, at the time of the transfer, were not sufficiently marketable to pay its debts and the refusal of all of the creditors to extend time for the payments of debts would necessitate a suspension of operations, there is sufficient evidence of insolvency to sustain the trustee's burden of proof.[23a] Where the bankrupt is a partnership, the trustee has the burden of proving not only that the firm, but also that all of the partners were insolvent at the time of the transfer.[24]

In trustees' actions to recover preferences, the bankrupt's books are admissible upon the issue of insolvency at a particular time,[25] as are also his papers connected with the business.[26] So also the bankruptcy record is admissible showing the bankrupt's petition, schedules, appraisal of estate and the list of creditors, together with the bankrupt's testimony as to the correctness of the schedules and lists.[27] Evidence that the bankrupt was reputed in the community to be insolvent at the date of the transfer has been held admissible.[28]

---

[19]Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243 (1904).

[20]See cases cited in GILBERT, *op. cit supra* note 1, at 816, n. 32.

[21]Doyle Dry Goods Co. v. Lewis, 5 Fed. (2d) 918 (C. C. A. 8th, 1925); Re Shaw, 7 Fed. (2) 381 (D. C. N. J. 1925); Manley v. Southern Supply Co., Re Burgess, 14 Fed. (2d) 273 (C. C. A. 4th, 1926); Re Gaylord, 225 Fed. 234 (1915); Re Carlile, 199 Fed. 612 (D. C. N. C. 1912).

[22]See *supra* note 10.

[23]McElvain v. Hardesty, 169 Fed. 31 (C. C. A. 8th, 1909).

[23a]Gates v. First Nat. Bank of Richmond, 1 Fed. (2d) 820 (D. C. Va. 1924).

[24]Crancer & Co. v. Wade, 26 Okla. 757, 110 Pac. 778 (1910).

[25]Ernst v. Mechanics etc. Bank of N. Y., 200 Fed. 295 (D. C. N. Y. 1911).

[26]Grandison v. Nat. Bank of Commerce, 220 Fed. 981 (D. C. N. Y. 1915).

[27]Lynch v. Bronson, 80 Conn. 566, 69 Atl. 538 (1908). But see Batchelder v. Home Nat. Bank of Milford, 218 Mass. 420, 105 N. E. 1052 (1914). See Buttz v. James, 33 N. D. 162, 156 N. W. 547 (1916).

[28]First Nat'l Bank of Maysville v. Alexander, 49 Okla. 418, 153 Pac. 646 (1915). The trustee can also show the common report that the bankrupt, immediately before the transfer, contemplated bankruptcy or was about to go into bankruptcy on account of insolvency, for the purpose of charging the creditor with notice. McAleer v. People's Bank, 202 Ala. 256, 80 So. 94 (1918).

It is said, however, that there may be a presumption to aid the trustee in sustaining his burden of proof to show a preference prohibited by law. There may be circumstances which raise a presumption that transfers amounted to a preference. If there be any such presumption, how does it affect proof of insolvency?

Many authorities insist that the mere fact that the debtor was afterwards adjudged bankrupt raises no presumption that he was insolvent at any time within the four months prior to the petition in bankruptcy.[29] Thus it has been said, "it [the bankrupt] was adjudicated a bankrupt on its admission of insolvency and willingness to be adjudicated a bankrupt; but such admission and adjudication speak only as of the time when made, and are not available to prove insolvency at an earlier period."[30] In a recent case, however, it was said that "when a corporation is adjudged bankrupt it is, of course, presumed under both the federal and the state law that it was insolvent for four months preceding the adjudication."[31] In *Re Dix,* the federal court maintained that where the undisputed facts established that the bankrupt was insolvent to a large extent at the time of bankruptcy, there was prima facie proof that he was insolvent at the time of the preference, about a month before.[32]

If a presumption arises, under such circumstances, the practical question is: What is the force and effect of the same? It is not easy to determine from *Re Dix.* The question arose on the review of an order of the referee based upon the proposition that there was no evidence of insolvency. Judge Learned Hand, in reversing the order, stated, "The proof of insolvency was sufficient. [After reviewing the undisputed facts.] In view of the fact that no dispute as to his insolvency appears in the testimony or in the briefs, this is sufficient prima facie proof

---

[29]McNeel v. Folk, 75 W. Va. 57, 83 S. E. 192 (1914); Kimball v. Dresser, 98 Me. 519, 57 Atl. 787 (1904); Swartz v. Frank, 183 Mo. 438, 82 S. W. 60 (1904); In re Chappell, 113 Fed. 545 (D. C. Va. 1901). See BLACK, *op. cit. supra* note 2, at 1344.

[30]Re Looschen Piano Case Co., 259 Fed. 931, 934 (D. C. N. J. 1919).

[31]Hoppe v. First Nat. Bank, 137 Wash. 41, 241 Pac. 662 (1925). But see the same court, the same judge, in Simpson v. Western Hardware & Metal Co., 97 Wash. 626, 167 Pac. 113 (1917).

[32]In re Dix, 267 Fed. 1016 (D. C. N. Y. 1920). See BLACK, *op. cit. supra* note 2, at 1344. In this case, it seems that there was no "going business" involved, the value of which might substantially affect the question of insolvency at any given time.

of insolvency on June 1 and 2, 1912."[33] It must be remembered that the only proof of insolvency at the date of the transaction was the fact that one month later, the bankrupt was hopelessly insolvent. This looks as if a genuine presumption was raised throwing upon the transferee the burden of showing that there was no insolvency, or at least casting upon him the burden of coming forward with some evidence to that effect, in the absence of which a finding of insolvency will be and must necessarily be made.

But this is not certain because of the peculiar relation which the referee in bankruptcy has to the district court. The findings of the referee, it is true, are ordinarily presumed to be correct until the contrary is shown,[34] and his position and duties are said to be analogous to those of a special master, directed to take evidence and to report his conclusions.[35] Still, if the findings are but inferences from established, admitted or undisputed, or stipulated facts, his conclusions need carry but little weight for, it is argued, the court is in as good a position to make the inferences as the referee.[36] Consequently, there is no good reason why the court may not reverse an order or finding of the referee merely upon the ground that there was evidence sufficient to support a contrary finding.[37]

Suppose, however, the question in the above case were raised in an action to a court and jury by the trustee to recover a preference? Will the jury be permitted to find a verdict either way on the issue of insolvency, or will the court direct a verdict of insolvency, or, if a contrary finding is returned, grant a new trial? If the undisputed or stipulated facts in such a situation raise a genuine presumption which casts upon the defendant the burden to proceed with evidence, and he fails to sustain this burden, obviously the jury will be compelled to find but one way. If, however, the facts create but a "per-

---

[33]In re Dix, *supra* note 32 at 1016, 1017.

[34]In re Malschick & Levin, 206 Fed. 71 (D. C. Pa. 1913); In re Elmore Cotton Mills, 217 Fed. 810 (D. C. Ala. 1914); Matter of Aronson, 233 Fed. 1022 (D. C. Ala. 1916).

[35]See GILBERT, *op. cit. supra* note 1, at 637.

[36]Matter of Brayton, 276 Fed. 1020 (D. C. N. Y. 1922); Matter of Solof, 2 Fed. (2d) 130 (C. C. A. 9th, 1924). "But findings based on undisputed facts which are set out in the record are entitled to no presumptions in their favor. In re Williams (D. C.) 120 Fed. 542 (D. C. Ga. 1903); In re Swift, 114 Fed. 947 (D. C. Mass. 1902)." In re Elmore Cotton Mills, 217 Fed. 810, 819 (D. C. Ala. 1914).

[37]*Cf.* Matter of Skurat (D. C. Minn.) 7 Am. Bankr, Rep. (N. S.) 176.

missible inference," that is, they amount to sufficient evidence to warrant a verdict of insolvency, the jury's verdict will stand. This is usually what is described as a prima facie case. The jury can find and are warranted in finding that there was insolvency, but are not required to do so. There is some evidence of insolvency and the evidence is sufficient to permit a finding to that effect. If, however, the jury is not convinced, since the trustee must get an affirmative verdict he must lose because he has failed to satisfy the burden of proof which has been on him all the time.

Re Dix does not answer this question. While it is true that the language used indicates a presumption in the strict sense, it is equally true that the strict result of the situation is consistent with what is called a mere warrantable inference. Since the court in a bankruptcy proceeding may or may not adopt the findings deduced from facts which are undisputed, it is obvious that the result in the case under discussion may not have been one that was necessarily compelled, by virtue of the presumption. It may be that the court were quite willing to concede that a finding either way, as to insolvency, was not an error of law, but, since the court had the power to make its own findings of fact from undisputed evidence, it chose to find contrary to the referee.

It seems safest, therefore, to conclude that such circumstances make out for plaintiff trustee but a prima facie case in the sense that they afford evidence which is sufficient to prove insolvency, although such a finding is still a question of fact and is not converted by the presumption and the absence of rebutting evidence into a question of law. It will depend upon how the question of fact is actually determined whether the trustee has sustained his burden of proof.[38]

The transferee or person benefited[39] must have reasonable cause to believe that by taking the property a preference will

[38]In re K. G. Whitfield & Bros., 290 Fed. 596, 600 (D. C. Tenn. 1923), the court indicated that this inference from the case under discussion is correct. It was said: "The mere fact, standing alone, that subsequent to the transfer of property a debtor is adjudged a bankrupt, does not raise the presumption that he was insolvent at the time of the transfer. In re Chappell, 113 Fed. 545 (D. C. Va. 1901), 7 Am. Bankr. Rep. 608. However, an adjudication of bankruptcy shortly following the transfer under certain conditions *might warrant the presumption.* In re Dix, 267 Fed. 1016 (D. C. N. Y. 1920), 46 Am. Bankr. Rep. 199." Italics added.

[39]It is sometimes overlooked that the required knowledge which constitutes

be effected. Before the amendment of 1910 the transferee had to have reason to believe that the bankrupt intended to prefer him, but now the question is whether a reasonable man in the creditor's position would believe that a preference would actually result.[40] Here again, the trustee must bear the burden of proof.[41] The presumption favors the defendant by requiring the inference, in the absence of proof to the contrary, that he had no such grounds to believe that a preference would result.[42] This presumption is such that if two inferences of substantially equal weight can be drawn from the evidence, that one must be drawn which will sustain the validity of the payment or transfer.[43] In other words, if the evidence is evenly balanced, the trustee must lose because he has failed to satisfy the onus imposed upon him which was to get an affirmative verdict by convincing the jury or other fact finding organ upon the issue of reasonable cause. Hence, if the trustee fails to adduce proof to overcome the creditor's proof that he has no reasonable cause for suspicion, the court will not permit, as a matter of law, the conveyance to be defeated.

The trustee must establish insolvency at the time of the transfer as a prerequisite to showing reasonable cause to believe that a preference would be effected. Of course, if insolvency cannot be shown, there can be no reasonable cause for the creditor to believe that he will get more than other creditors of the same class.[44] But more is required, still, to furnish reasonable cause for such belief; the creditor must know about the insolvency or he must have within his knowledge facts sufficient to charge him with knowledge,[45] for there will be no unlawful

---

reasonable cause is not necessarily confined to the transferee or person from whom the prefereuce is sought to be recovered. See 7 C. J. 148, n. 65, (j). See also 4 REMINGTON, BANKRUPTCY (3d ed. 1923) § 1837.

[40]*Cf.* (1927) 1 DAK. L. REV. 32.

[41]Brown v. First State Bank of Weimar, 199 S. W. 895 (Tex. Civ. App. 1918).

[42]Calhoun County Bank v. Cain, 152 Fed. 983 (C. C. A. 4th, 1907).

[43]Matter of Gaylord, 225 Fed. 234 (D. C. N. Y. 1915). See GILBERT, *op. cit. supra* note 1, at 864.

[44]Wrenn v. Citizen's Nat. Bank, 96 Conn. 374, 114 Atl. 120 (1921). Although this may degenerate into sophistry, it is of no consequence, since obviously the trustee could not recover the preference, if there was no insolvency, whether the debtor could be charged with "reasonable cause to believe" or not.

[45]See Deland v. Miller & Cheney Bank, 119 Iowa, 368, 93 N. W. 304 (1903); Butler Co. v. Goembel, 143 Fed. 295 (C. C. A. 7th, 1905). "As a first and essential requisite the creditor must have reasonable cause to believe that the debtor is insolvent. This is necessarily implied in, and must serve as a foundation for, reasonable cause to believe that a preference will result from the transaction. Without this, there can be no cause, within the limits of reason, for

preference at all if, at the time, the debtor was solvent.[46] But suppose the trustee can show that the debtor was in fact insolvent at the time of the transfer and that the creditor in fact knew of such insolvency, or had knowledge of facts sufficient to put him on inquiry. What is the effect of the concurrence of these two circumstances?

Before these questions can be answered some general considerations may be profitably summarized.

A given set of circumstances may have several effects so far as its probative effect is concerned. In the first place, such circumstances may be no evidence whatever, when taken alone, on the issue of reasonable cause. They have in themselves no probative effect whatever. Consequently no finding that the creditor did, in fact, have reasonable cause to believe that a preference would be effected could be predicated upon such circumstances. On the other hand, the same circumstances may be of some evidentiary value and may be of sufficient weight so that if they are taken with, although they require, some further corroborative proof, they may be sufficient to show reasonable cause. Here, as a matter of law, the burden of proof has not been sustained by the trustee.[47]

Again, the circumstances may be of such a nature and of such weight that they will support a finding of reasonable cause, taken alone and with no other evidence either way. In such a situation, we have the so-called "prima facie" case, which means that if the circumstances are not disputed and if there is no rebutting evidence on the issue of reasonable cause, there will be no error in a finding either way.[48] Reasonable cause is here a pure question of fact.

In the next place, the circumstances may carry such weight as to establish reasonable cause if there is no rebutting evidence introduced by the defendant. A burden to proceed with proof is thereby thrown upon the defendant which, if he fails to sustain, will subject him to an adverse ruling by the court. There is no burden of proof upon the defendant to show an

---

the creditor to suppose that he is gaining a preference and consequently the transaction will not be voidable though it does actually result in a preference." BLACK, *op. cit. supra* note 2, at 1311.

[46]Bankruptcy Act, § 60a.

[47]Calhoun County Bank v. Cain, 152 Fed. 983 (C. C. A. 4th, 1907).

[48]Feilbach Co. v. Russell, 233 Fed. 412 (C. C. A. 6th, 1916). *Cf.* 5 WIGMORE, EVIDENCE (2d ed. 1923) 455, § 2494 (2).

absence of reasonable cause, but there is upon him a burden to offer proof, and this burden has shifted from the trustee to the creditor.

Still again, the circumstances may be of such weight as to cast upon the defendant the burden of proving the good faith[49] of the transaction by a preponderance of evidence, which means that he must show the existence of grounds for a reasonable man to base good faith. If he fails to respond with substantial evidence, there will be required a finding against him.[50] He is subject to all the penalties and liabilities of the ordinary party upon whom the burden of proof is imposed. His failure to offer proof under these circumstances converts a question of fact into a question of law, and the rule of law is against him on the issue of reasonable cause.

In the last place, circumstances may, as a matter of law, amount to reasonable cause to believe that a preference will be effected. Courts speak of this situation as a "conclusive" presumption of reasonable cause. It means that here the circumstances *are* reasonable cause, and no further proof either way is necessary. The circumstances being established, the question of reasonable cause is no longer one of fact, but exclusively a question of law.[51] Any attempt to classify every possible set of circumstances must necessarily fail, if for no other reason than that the courts are not wanting in ambiguity in their language. Some situations, however, which are almost invariably existent in a suit to recover preferences may lend themselves to analysis.

Prior to 1910, when the creditor was required to have reasonable grounds to believe that a preference was intended, instead of reasonable cause to believe that a preference would be effected, it was generally held, as a matter of law, that it was necessary for the debtor himself actually to have had such an

---

[49]"Good faith" here means an absence of "reasonable cause" to believe that a preference would be effected.

[50]*Quaere*, is defendant's duty, as to producing evidence any greater here than in the next preceding set of circumstances? *Cf.* 5 WIGMORE, *op. cit. supra* note 48, at 443, §2487 (a).

[51]See Ogden v. Redish, 200 Fed. 977 (D. C. Ky. 1912). *Cf.* "preference in law" with "fraud in law" or "legal fraud"—facts which amount to fraud in law regardless of the state of mind of the grantor, as in the case of an insolvent debtor making a voluntary conveyance and thus defeating the claims of existing creditors. Fluke v. Sharum, 118 Ark. 228, 176 S. W. 684 (1915); Goodman v. Wineland, 61 Md. 449 (1884); Oliver v. Moore, 23 Ohio St. 473 (1872).

intent.[52] Under this requirement, the intent on the part of the debtor was conclusively presumed if the necessary effect of the transfer was to amount to a preference,[53] or if a preference actually resulted,[54] and if, at the time he knew of his own insolvency.[55] So, if a preference actually resulted, the trustee was relieved of the burden of proof to show that the debtor had an intent to prefer.[56] The same or a similar rule was applied by some courts to the issue of reasonable cause on the part of the defendant creditor, so that the net result was that if the necessary effect of the transfer was to create a preference in fact, the creditor was presumed to have had reasonable grounds for belief that such intent existed on the part of the debtor.[57] Consequently, it has been declared that where a creditor knew that the bankrupt was insolvent, and thereupon obtained a preference within four months, he was presumed to have had reasonable cause to believe that a preference was intended.[58]

After the change in the statute requiring reasonable cause, some courts had no difficulty in arguing upon the analogy of the foregoing presumption that if the debtor was known to be insolvent or there were grounds to put a prudent creditor upon notice, and a preference actually resulted, he was presumed to have the necessary reasonable grounds to believe that such would be the result of the transaction.[59] The effect of this presumption was to bring it within the class of conclusive presumptions. In truth, it is not a presumption at all, but a rule of law which operates to definitely fix reasonable cause. In short, if the creditor knows of the bankrupt's insolvency and the eventual result of the transfer is to produce a preference, reasonable cause in law exists, and there is no question of fact involved. The requirements of the Act are satisfied.[60] Thus, it has been stated by the Massachusetts court:

---

[52]Hardy v. Gray, 144 Fed. 922 (C. C. A. 1st, 1906); In re First Nat. Bank of Louisville, 155 Fed. 100 (C. C. A. 6th, 1907).

[53]See Western Tie & Lumber Co. v. Brown, 196 U. S. 502, 508, 25 Sup. Ct. 339 (1905); In re Dorr, 196 Fed. 292 (C. C. A. 9th, 1912).

[54]Brewster v. Goff Lumber Co., 164 Fed. 124 (D. C. Pa. 1908).

[55]Toof v. Martin, 13 Wall. 40 (U. S. 1871).

[56]*Ibid.* 48. See WILLISTON, CASES ON BANKRUPTCY (2d ed. 1913) 255, n. 1.

[57]Utah Ass'n. of Creditmen v. Boyle Co., 43 Utah, 523, 136 Pac. 572, 574 (1913). See Lazarus v. Eagen, 206 Fed. 518 (D. C. Pa. 1912).

[58]Crawford v. Rumpf, 205 Pa. 154, 54 Atl. 709 (1903).

[59]Hewitt v. Boston Straw Board Co., 214 Mass. 260, 101 N. E. 424 (1913).

[60]In Hewitt v. Boston Straw Board Co., *supra* note 59, the court, in declar-

"It is unnecessary to show actual knowledge or belief by the creditor. If the circumstances are such as would lead the ordinary prudent man of affairs to the conclusion that his debtor is insolvent, he obtains a preferential payment within the meaning of the statute, by accepting payment in whole or in part of the debt, where the transaction takes place within four months prior to adjudication; and other creditors of the same class, because of the greater percentage received, must accept decreased dividends."[61]

Such seems to be the inevitable holding in some of the cases, but consideration will indicate that this is an irrational conclusion. The section of the Bankruptcy Act under consideration expressly provides that in order to set aside a transaction as a preference the debtor must not only be insolvent but the transferee or person benefited must have reasonable cause to believe a preference must be effected, which, from the definition of a preference, implies something more than knowledge of or reasonable cause to believe the debtor insolvent.[62] The mere knowledge, then, of insolvency might not constitute reasonable ground to believe that there would be a preference, and there are cases which indicate as much.[63] The defendant creditor may submit evidence to indicate that, in spite of his knowledge of insolvency, he believed, with reasonable grounds, that there would be no preference result.

---

ing the effect of knowledge of insolvency by the creditor and the actual and inevitable result of the transfer effecting a preference, declared: "The bankrupt and the defendant must be presumed to have known that what had been done resulted in a preference." *Cf.* Bryant v. Wolf, 94 Misc. 643, 158 N. Y. Supp. 678 (1916). *Cf.* re Hoover-McClintock Motor Car Co., 1 Fed. (2d) 660 (D. C. Tenn. 1924) particularly at page 662, holding, as a matter of law, that a transfer, within four months by an insolvent, creating a preference is void, if the creditor knows of the insolvency. See also, Marin v. McDonald Mfg. Co., 159 Minn. 447, 199 N. W. 176 (1924); Hanson v. Shank, 159 Minn. 278, 198 N. W. 804 (1924).

[61]See Rogers v. American Halibut Co., 216 Mass. 227, 103 N. E. 689, 690 (1913); See WILLISTON, CASES ON BANKRUPTCY (2d ed. 1913) 256.

[62]"If and in so far as such 'reasonable cause to believe' means simply that they had reasonable cause to believe that Ponzi (the bankrupt) was insolvent, I find that they did have such reasonable cause to believe.

". . . But the statute requires more than reasonable cause to believe that Ponzi was insolvent. It requires reasonable cause to believe that such payments 'would effect a preference'; that is, that 'the effect of the payments' will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Anderson, C. J., in Lowell v. Brown, 280 Fed. 193, 203 (D. C. Mass. 1922).

[63]Kennard v. Behrer, 270 Fed. 661 (D. C. N. Y. 1920); Lowell v. Brown, 280 Fed. 193 (D. C. Mass. 1922); *cf.* also Kimmerle v. Farr, 189 Fed. 295 (C. C. A. 6th, 1911).

In *Kennard v. Behrer*,[64] Judge Hand made this distinction and explained it lucidly. "The act of March 2, 1867 (14 Stat. 534, 35), was differently worded; it made the test reasonable cause to believe the bankrupt insolvent. The present act, up to 1910, made the test reasonable cause to believe that the bankrupt intended to effect a preference. Under this statute it was decided that the bankrupt's knowledge that he was insolvent was not equivalent to an intent to create a preference. . . . It was recognized that in spite of the fact of insolvency the bankrupt might honestly suppose that he could in the end pay them all, and indeed that the creditor might share his belief. Now that the statute is changed, and intent to prefer gives place to belief that a preference will result, the rule is the same. If the bankrupt's honest judgment that he could pay in full protected the creditor then, the creditor's honest judgment to the same effect will protect him now. The change from the act of 1867 was certainly with a purpose which can be fulfilled only if the distinction which I mention is observed."[65]

Accordingly, the rule of *Kennard v. Behrer* is to be understood as meaning that although the debtor was insolvent at the time the security or payment is given, and although the creditor knew that he was insolvent at the time, yet if the parties honestly believe upon reasonable grounds that some of the assets, worthless at the time, would, if the debtor is allowed to continue business, realize enough to pay all debts in full, there has been no preference; the creditor not having reasonable grounds to believe that a preference would be effected.

There is no doubt of the soundness of this reasoning, and in the light of the result thereof, there is no doubt of the fallacy in holding, as matter of law, that knowledge of insolvency amounts to reasonable cause. The presumption, however, can be modified to conform to the rule enunciated by Judge Hand in *Kennard v. Behrer, supra.* If the debtor knew or had reasonable cause to know of the debtor's insolvency when he took the preference, and if the result of the transfer was to *necessarily* produce a preference, there exists in law reasonable cause

---

[64]270 Fed. 661 (D. C. N. Y. 1920).

[65]*Ibid.* at 664. In Hardy v. Gray, *supra* note 52, it was held that something more than knowledge of insolvency was necessary to establish intent to prefer on the part of the debtor. In Kimmerle v. Farr, *supra* note 63, something more than knowledge of insolvency was necessary to establish reasonable cause on the part of the creditor.

to believe such would result. This means that the creditor could have no reasonable cause to hope that the insolvent debtor might subsequently retrieve his fortunes and pay all his creditors. The test, however, is not whether a preference actually results, but whether there were any grounds to believe and an actual belief that a preference would be avoided. When the trustee has proven the insolvency of the debtor and knowledge on the part of the creditor, the burden of proof is undoubtedly on the creditor to prove that he had an honest belief based upon reasonable grounds that the other creditors would lose nothing by the transaction.[66]

If summarized, then, the presumptions discussed above should be resolved into some such proposition as the following: Where the bankrupt is distinctly insolvent at the time of the adjudication in bankruptcy, in a subsequent action by the trustee in bankruptcy to recover a preference there is a warrantable inference (but not a compulsory one) that he was insolvent at the time of the transfer if the same was made within the next preceding four months from the petition in bankruptcy. Where this is the situation, a presumption arises which demands, as a matter of law, a finding that the creditor had reasonable grounds to believe that a preference would be effected, if it can be shown that the creditor at the time either had knowledge of the insolvency or had knowledge of facts sufficient to put a reasonable man upon notice, unless the creditor can show that he had grounds to believe, as a reasonable man, that the other creditors would get as much in payment of their claims. All the other elements being present, the burden of proof, of course, is upon the creditor to show the latter situation.

The question is now presented whether there is any presumption to aid the trustee in showing knowledge on the part of the creditor of insolvency. While circumstantial evidence may be sufficient to satisfy the burden imposed upon the trustee to show such knowledge, the circumstances must be more than merely suspicious or colorable.[67] Circumstances sufficient to create a suspicion or fear of insolvency are sufficient to charge

---

[66]We may say that the presumption against defendant becomes conclusive if be fails to offer substantial proof of facts to reasonably justify an honest belief.

[67]First Nat. Bank v. Abbott, 165 Fed. 852 (C. C. A. 8th, 1909); Nichols v. Elken, 225 Fed. 689 (C. C. A. 8th, 1915); Roseman v. Coppard, 228 Fed. 114 (C. C. A. 5th, 1916).

a creditor with notice.[68] "The arousing of suspicion as to keeping faith," it has been said, "which might lead to such investigation as would show knowledge of insolvency, is not equivalent to the knowledge of facts which of themselves would indicate that a preference was actually being given."[69] And mere proof that an alleged preferred creditor of a bankrupt had knowledge at the time of the preference that the bankrupt was unable to pay the creditor's debt was insufficient to charge the creditor.[70]

There seems to be no rule or concrete test to designate exactly what, in a given case, shall put the creditor on notice. The ordinary standards are applicable. If there are no facts shown to have been within the creditor's knowledge which a reasonable man might find sufficient to put him on inquiry, the case should not go to the jury at all.[71] There should be a directed verdict for the defendant.[72] If the facts shown to have been known to the defendant at the time of the transfer were such that reasonable men might find, but would not necessarily be compelled to find sufficient to put an ordinary prudent man upon inquiry as to solvency, there is a jury question and the

---

[68]Arthur v. Harrington, 211 Fed. 215 (D. C. N. Y. 1914). In considering the effect of proof of circumstances tending to show reasonable cause, *cf.* the following: "There are different degrees of knowledge which it is possible for the preferred creditor to have. He may know that the debtor is insolvent and that the transfer to him covers a greater percentage of his property thau he is entitled to, and hence that it effects a preference. . . . Then comes, not such knowledge, but knowledge of that, the reasonahle effect of knowing which is belief to that effect. This degree of knowledge is called for in so many words. Then comes knowledge of that, the reasonable effect of knowing which is not such belief, but only a fear or suspicion that such is the case. Such a degree of knowledge is certainly not within the statute.

". . . If the degree of knowledge is such as to engender fear that such is the case, so strong that the preferred creditor refrains from availing himself of the means at his hand for ascertaining the truth, in order to keep himself in the dark in regard thereto, and to be in position to claim that he did not have reasonable cause to believe that the transfer to him would work a preference, the case is covered by the statute." Cochran, J., in Ogden v. Reddish, 200 Fed. 977, 988 (D. C. Ky. 1912).

[69]Markeim v. Hurley, 197 Fed. 183, 185 (D. C. N. Y. 1912).

[70]Andrews v. Kellogg, 41 Colo. 35, 92 Pac. 222 (1907). The fact that the bankrupt's notes frequently went to protest is not sufficient to put the holder on inquiry to charge him with notice of insolvency. Re Thomas Deutschle & Co., 182 Fed. 435 (D. C. Pa. 1910). But see Conners v. Bucksport Nat. Bank, 214 Fed. 847 (D. C. Me. 1914), also 216 Fed. 990 (C. C. A. 9th, 1914).

[71]According to the general rule. See Summit Coal Co. v. Raleigh Smokeless Fuel Co., 99 W. Va. 11, 128 S. E. 298 (1925).

[72]If the case is not tried to a jury, the same standards, of course, apply. The point is that there is a question of law, under such circumstances, with a rule of law to determine it.

verdict will be upheld whether for the trustee or for the creditor.[73] But if the facts shown to have been within the creditor's knowledge at the time were of such a nature that it can be said no reasonable man could fail to be put upon inquiry, the case should never go to the jury, because if a verdict for defendant should be returned, the court would necessarily be obligated to grant a new trial. Under such circumstances, of course, there will be a directed verdict for the trustee.[74]

There may still be other circumstances tending to reduce the onus imposed upon the trustee to prove reasonable cause. Sometimes they are described in a different way, and their effect evaluated from a different point of view. Thus it is said that while the burden of proof is always on the trustee to show the elements of a preference, the circumstances of the case may be such as to be of vital importance in determining the question whether that burden has been sustained.[75] Before the 1910 amendment, it was urged that the circumstances that the creditor was a near relative makes a "prima facie" case for the trustee, and that the burden "to prove by satisfactory evidence" that the transaction was in good faith is upon the creditor.[76]

But this case was decided when the trustee was required to show an intent by the debtor and reasonable cause to believe that such an intent existed on the part of the creditor. Does the fact of relationship have any effect under the present law? It is difficult to understand how any presumption is raised by such circumstances. Since the intent of the debtor is of no consequence,[77] lack of good faith is no element in the trustee's case.[78] If there is a question of collusion, the transfer may be

---

[73]Since the proposition is a doubtful one, it is nccessarily a question of fact, and for the jury, if there be one. Whether there is any evidence to sustain a finding, is a question of law for the court; whcthcr there is sufficient evidence to warrant a verdict, is for the jury to say. Davis v. Hill, 272 S. W. 292 (Tex. 1925).

[74]If facts are undisputcd or if tbey are admitted by defendant, and the same are susceptible of but one interpretation, namely, as being sufficient to charge the creditor with knowledge of insolvency, and if this, coupled with other facts, presents what amounts to reasonable grounds for bclief that the transfer would effect a preference, the court will direct a verdict for trustee. *Cf.* Hanson v. Shank, 159 Minn. 326, 198 N. W. 804 (1924); Shale v. Farmers Bank, 82 Kan. 649, 109 Pac. 408 (1910).

[75]See 4 REMINGTON, BANKRUPTCY (3d ed. 1923) §1829.

[76]Re Sanger, 169 Fcd. 722 (D. C. W. Va. 1909). See also GILBERT, *op. cit. supra* note 1, at 864.

[77]Soule v. First Nat. Bank of Ashton, 26 Idaho, 66, 140 Pac. 1098 (1914).

[78]Except in so far as good faith means an absence of reasonable cause, but

a fraudulent one. Thus the factor of relationship between the parties is important respecting their good faith and raises presumptions in the trustee's favor when he is seeking to set aside a transfer of property on the ground that it constitutes a fraudulent conveyance.[79] Preferences, however, are not attacked on the grounds of either actual or legal fraud, but entirely upon the ground that an equitable distribution of assets of an insolvent debtor is demanded from the point of view of policy. The debtor has reserved no benefit to himself when he makes a preferential payment. The effect of the prohibition against preference is largely to remove the premium which the law has immemoriably placed upon "diligence" in the creditor, with a generous substitution of equitable principles in its stead.[80]

In a suit brought by a creditor's bill to recover property conveyed to a wife to secure a pre-existing indebtedness, it has

---

if the creditor had reasonable cause to believe that a preference would be effected and that the debtor was insolvent, it is not necessary that the debtor should bave intended a preference or that the creditor should have cause to believe that such intention existed. See Covington v. Brigman, 210 Fed. 499 (D. C. N. C. 1914); Brigman v. Covington, 219 Fed. 500 (C. C. A. 4th, 1915).

[79]The courts are not agreed upon the precise effect of such presnmptions. It has been declared that no clearer proof of *bona fides* is required as between relatives than as between any othcr vendor and vendee. Teague v. Lindsey, 106 Ala. 260, 17 So. 538 (1894), but *cf.* Lehman, Durr & Co. v. Graunbutt, 88 Ala. 478, 7 So. 299 (1889). Here, of course, no presumpion is raised by virtue of blood kinship. See Martin v. Fox, 40 Mo. App. 664 (1890). Under this ruling, relationship alone would not be sufficient evidence of fraud to support a finding to that effect. Adams v. Ryan, 61 Iowa, 733, 17 N. W. 159 (1883); Klein v. Gallin, 136 App. Div. 382, 120 N. Y. Supp. 1036 (1910). The mere fact that a transaction was between members of the family, has been said not to warrant a presumption of fraud. Steinfort v. Langbout, 170 Iowa, 422, 152 N. W. 612 (1915); State Bank of Woolstock v. Schutt, 174 Iowa, 583, 156 N. W. 762 (1916).

But it is otherwise if the debtor is embarrassed or insolvent. The burden of proof is then on the parties to show good faith. Treadwell v. Graham, 88 N. C. 308 (1883). Also as between husband and wife, a voluntary conveyance by an insolvent debtor throws the burden upon the parties to uphold the transaction. McConnell v. Hopkins, 86 Ark. 225, 110 S. W. 1039 (1908); Gray v. Collins, 139 Ga. 776, 78 S. E. 127 (1913); Tucker v. Weatherbee, 98 S. C. 402, 82 S. E. 638 (1914). So also as to transactions between brother and sister. McDonough v. McGowan, 165 Ky. 425, 177 S. W. 277 (1915).

The following summary has been made: Conveyauces to near relations of an embarrassed debtor are looked upon with suspicion, presumed fraudulent when voluntary, and conclusively presumed fraudulent as to existing creditors when the debtor's embarrassment proceeds to financial wreck. Papan v. Nabay, 106 Ark. 230, 152 S. W. 107 (1913).

[80]"Under the Bankruptcy Act, preferences may be set aside by the trustee on the theory that equality between the creditors of the same class is equity; that it is better administration of justice that there should be such equality than that a favored few, even though they may be diligent, should receive the lion's share of the estate." Goetz v. Zeif, 181 Wis. 628, 195 N. W. 874, 879 (1923).

been declared that, except as prohibited by the Bankruptcy Act, a husband may prefer his wife as a creditor in the absence of actual or constructive fraud to which she is a party, and, although such transactions are subject to the keenest scrutiny they are not ipso facto illegal.[81] From this it is deduced that so far as an unlawful preference is concerned, a transaction between relatives or between husband and wife presents no different problem than does a transaction between any other parties. It seems, however, that the relation of the parties, their intimacy or lack of it, the usual or unusual nature of the transfer and the opportunities of the creditor for knowledge are all facts which may be properly considered as circumstantial evidence, to be given such weight as they may merit, in determining reasonable cause within the meaning of the statute.[82] This is far different, however, from facts sufficient to raise a presumption in law, with its corresponding effect upon the trustee's burden of proof.[83]

In considering the effect of the various types of presumption arising under the section of the Bankruptcy Act providing for avoidance of preferences by the trustee, there seem to be several reasons for the confusion that exists. In the first place, the courts frequently employ language which suggests the old law of requiring an intent on the part of the debtor and reasonable cause for believing the same by the creditor.[84] This introduces the element of good faith in the sense of purpose. If good faith has any place in the law of preferences as it now exists, it must be confined to knowledge of the effect of the transfer, irrespective of the purpose of either the debtor or the creditor. If this is all it means, there is no advantage in using the expression at all, and it had better be confined to the law of fraudulent conveyances where it more properly belongs.

Again, no little ambiguity results from failing to distin-

---

[81]Weld v. McKay, 218 Fed. 807 (C. C. A. 7th, 1914). It seems that there was a presumption against such a transfer, hut whether it was on the ground of preference or fraudulent conveyance is not clear. No authority is cited.

[82]Goetz v. Zeif, 181 Wis. 628, 195 N. W. 874 (1923).

[83]In Watson v. Adams, 242 Fed. 441, 444 (C. C. A. 6th, 1917), the court, in referring to a transfer by a debtor, while insolvent, to his mother and sister, declared: ". . . the inference that they knew (had reasonahle cause, etc.) they would get their pay, while others would fare worse, rests only on suspicion—an insufficient foundation. The decree . . . must be reversed, and the court helow instructed to dismiss the petition."

[84]*Cf.* discussion in Wolf Mfg . Co. v. Battreal Shoe Co., 192 Mo. App. 113, 180 S. W. 396, 399 (1915).

guish between evidence of insolvency and evidence of reasonable cause. One gets the impression from some of the cases that evidence of one is evidence of the other and that what establishes the one will be sufficient to prove the other. It is common for courts to declare that payments by an insolvent debtor are not recoverable as preferences unless the payee had actual or constructive notice of the debtor's insolvency when they were made,[85] or to say that it is not necessary that the creditor actually knew that the debtor was insolvent, but the preference is void if he had information sufficient to have put an ordinary business man on inquiry.[86] The inference that if insolvency is known or if grounds for such knowledge are present, the transfer is voidable, does not, as we have seen, necessarily follow. Thus, unless analysis of the exact gradations of proof is insisted upon and the clear-cut effect of such presumptions as are raised definitely distinguished, the matter of proving the various elements of a preference is fraught with numerous pitfalls.

In one of the most frequently cited cases,[87] the court intimates by numerous dicta that reasonable cause to believe that the debtor is insolvent amounts to reasonable cause to believe that there would be a preference, apparently ignoring the fact, not uncommon in modern business, that a creditor might actually know of his debtor's insolvency and still have reasonable grounds to believe that there would be no preference in the end. The headnote to the case indicates the fallacy: ". . . the creditor must have reasonable cause to believe that the financial condition of the debtor at the time when the transfer was made was such that the security when enforced would work a preference; i.e., that the debtor was then insolvent."

Finally, as usual, great confusion results from the customary use by the courts of the expressions "presumptions," "prima face case," and "burden of proof" in several different senses. This ambiguity is not confined to bankruptcy law, but it greatly confuses the law relating to preferences. We have seen that there are three common meanings attached to the first expres-

[85]Scott County Milling Co. v. Powers, 112 Miss. 798, 73 So. 792 (1916).

[86]Courts too often assume that if the creditor is chargeable with knowledge of insolvency, he is therefore chargeable with "reasonable cause." *Cf.* Capital Nat. Bank v. Wilkerson, 36 Ind. App. 467, 72 N. E. 247, 249 (1904).

[87]See In re Gaylord, 225 Fed. 234 (D. C. N. Y. 1915).

sion excluding the "conclusive presumption," three meanings to the second expression,[88] and two meanings involved in the third. It is necessary to go carefully into the language of many opinions to find which meaning is intended, only to find that the results of the case, on the pleadings, indicates that the effect accorded to the presumption is entirely inconsistent with the explanation given. Consequently, it is not uncommon for both courts and attorneys to cite cases involving presumptions of one kind as authority for invoking one which produces an entirely different effect. Thus every case in which a trustee recovers a preference requires close analysis to determine the extent of the advantage to the trnstee in utilizing the presumptions arising from the circumstantial evidence which, in so many situations, is all that he can depend upon to establish his case.

---

[88]Wigmore comments upon the two meanings of "prima facie" case. See 5 WIGMORE, EVIDENCE (2d ed. 1923) 455 §2494.